COMMONWEALTH OF THE BAHAMAS **VBI No. 49/02/2023**

IN THE SUPREME COURT

Criminal Division

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

The Applicant

V

MACHINO McKENZIE A.K.A. "CHINO"

The Respondent

Before: **The Honorable Justice Dale Fitzpatrick**

Appearances: **Ms. Jacklynn Burrows for the Applicant**

Mr. Damien White for the Respondent

Heard on the Papers

Criminal Evidence (Witness Anonymity) Act 2011, Chapter 91B — Witness anonymity measures — Whether anonymity measures should be granted in respect of Witnesses Alpha and Beta — Identification Evidence - Evidence Act 2014, Chapter 65 — Evidence by live television link — Penal Code, Chapter 84, section 291(1) — Respondent charged with murder

DECISION

FITZPATRICK J

Introduction

[1.] The Applicant seeks an order permitting an intended witness, namely "Alpha" to provide his/her trial testimony anonymously pursuant to *Sections 11(1) and 12(1) of the Criminal Evidence (Witness Anonymity) Act 2011 Chapter 91B* (the "*Witness Anonymity Act*" or the "*Act*").

[2.] The Applicant also seeks an order to permit Alpha to testify anonymously by way of live television link pursuant to *Section 78b(1)(a -c) of the Evidence Act 2014 Chapter 65*.

[3.] The applications for anonymity and live television link shall together be referred to as the "Application".

The Background

[4.] The Respondent is charged with murder contrary to *section 291(1)(a) of the Penal Code, Chapter 84*. The Voluntary Bill of Indictment ("VBI") filed by the Applicant alleges that, on 12th November, 2022, the Respondent shot and killed Mr. Averyon Duncanson a.k.a. "Cuz" outside of a bar in the area of Eden Street and Foster Street, Nassau, New Providence.

[5.] Witness Alpha provided an anonymous statement to the police dated 14th November, 2022. Witness Alpha stated that he/she had lived in the Central District of New Providence all of his/her life and thereby came to know all those who live in that area or come to visit "by their names, alias or faces". Witness Alpha stated he/she, on November 12th at around 8:40 p.m., was walking past a bar in the area of Eden Street and Foster Street, Nassau when he saw someone he knew as Cyril or "CJ" and another male that Alpha knew to be CJ's cousin. Witness Alpha stated that he/she saw a male exit the rear left passenger side of a light coloured jeep holding a handgun in his right hand who fired six to seven shots directly at the person Alpha knew to be CJ's cousin. Witness Alpha described the assailant as tall, slim build, dark skin with bushy hair like dreadlocks wearing all black clothing at the time of the shooting. Witness Alpha stated that he/she had a clear view of the assailant from a distance of twenty feet without any obstructions over a period of five seconds.

[6.] Witness Alpha attended with the police on November 20th where he/she identified the Respondent from a twelve-man photo lineup as "the bushy hair guy who had the gun and was shooting the guy who came with CJ."

[7.] In a further statement dated 6th March, 2026, Witness Alpha stated that he/she would give evidence at trial only if permitted to do so anonymously owing to "fear that I will be seriously harmed or killed if my identity is revealed".

Analysis

[8.] In determining this issue, the Court is directed by sections 4, 11–14 and 16 of the *Witness Anonymity Act*.

[9.] Murder is a qualifying offence under Section 4. Section 11 sets out the measures available to the Court to protect a witness's identity and provides the basis for the relief sought by the Applicant. Section 12(2)(b) addresses the non-disclosure of information that could identify a witness.

[10.] Section 13 of the Act sets out the preconditions for making a Witness Anonymity Order. The Court must consider whether the proposed measures are necessary to protect the witnesses' safety or prevent real harm to the public interest; whether the Respondent would nevertheless receive a fair trial; and whether the witnesses' evidence is sufficiently important that their testimony is required in the interests of justice. In that assessment, the Court will consider the witnesses stated unwillingness to testify without the proposed measures, their asserted fear of death, injury or damage to property, and the alleged risk of harm to the public interest if they testify without an order.

[11.] Moreover, the Court must consider the following:

> (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
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> (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence comes to be assessed;
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> (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
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> (d) whether the witness's evidence could be properly tested, whether on grounds of credibility or otherwise, without his identity being disclosed;
>
> (e) whether there is any reason to believe that the witness —
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> (i) has a tendency to be dishonest; or,
>
> (ii) has any motive to be dishonest in the circumstances of the case, having regard, in particular, to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant; and,
>
> (f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

[12.] The process for receiving the testimony of an anonymous witness is now in place for the Supreme Court. The anonymous witness is secured in a room or building separate from the courtroom where the trial is being held. There are four monitors in the trial courtroom: one on the judge's bench, one placed in front of the jury box, one for prosecution counsel and one in the body of the courtroom. The judge, the jury and the prosecution are provided with noise cancelling headphones. The anonymous witness appears by video on the judge's, the jury's and prosecution

counsel's monitor. The witness's identity remains anonymous. However, the jury, the judge and the prosecution see and hear the witness without any measures obscuring the witness's appearance or distorting the witness's voice. By contrast, the accused and defence counsel view the witness on a monitor situated in the body of the courtroom, through which the witness's appearance is obscured and voice distorted.

[13.] The Respondent opposes the Application on the ground that granting anonymity would unfairly deprive him of the opportunity to confront his accuser. He argues that the right to face one's accuser is fundamental to his right to a fair trial enshrined in Article 20(2)(c) of *the Constitution.* This is a legitimate concern but it is not, in and of itself, determinative.

[14.] The Respondent specifically opposes any alteration of a witness' voice to the jury suggesting this would restrict the jury's ability to assess the witnesses' evidence, including with respect to truthfulness. This is not the process followed for anonymous witness testimony in the Supreme Court, as described above. The jury hears the anonymous witness without modulation.

[15.] In addition, the Respondent specifically opposes a witness appearing to provide testimony by video link suggesting this would restrict his ability to test the identification evidence of that witness. The Respondent does not provide any details or explanation why video testimony would restrict his cross-examination. The Court cannot meaningfully address this argument without such supporting details. The Respondent retains the full right of cross-examination where an anonymous witness order is made. He is not restricted in the questions he can ask by such an order.

[16.] Finally, the Respondent specifically opposes a witness appearing to provide testimony by video link arguing this would hinder his ability to visit the *locus in quo* further to an application he indicates an intention to bring.

[17.] No application has been filed by the Respondent to visit the *locus in quo*.

[18.] The crime scene was photographed by a police crime scene technician, Detective Sergeant Henterro Armbrister #2914, just over one hour following the shooting. These crime scene photos have been disclosed to the Respondent. Detective Sergeant Armbrister is listed on the VBI as a witness for trial. Witness Alpha and Detective Sergeant Armbrister can be shown the crime scene photos and cross-examined with respect to his/her observations.

[19.] The Respondent does not provide any details or explanation of any kind respecting the need for an attendance at the crime scene beyond a vague reference to the "nature of Alpha witness testimony". The Court cannot meaningfully address the Respondent's objection to an anonymous witness order on this basis without such supporting details.

[20.] The observations of Lord Bingham of Cornhill in *Steven Grant v The Queen [2006] UKPC 2* are instructive in response to the Respondent's objection. In that case, the Board considered a constitutional challenge to a Jamaican statutory regime providing for witness anonymity:

> "(14) The Board would not wish to question the general validity of the principle for which the appellant argues. The evidence of a witness given orally in person in court, an oath or affirmation, so that he may be cross-examined and his demeanor under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence, should continue to be so regarded. Any departure from that practice must be justified. But for a number or reasons, in large measure those advanced for the Attorney General and accepted by the Court of Appeal, the Board cannot conclude that section 31D of the Evidence Act is inconsistent with section 20(6)(d) of the Constitution."
>
> "(15) It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one: *Mootoo v Attorney General of Trinidad and Tobago* [1979] 1 WLR 1334, 1338-1339. Thus the appellant has a difficult task."

[21.] Further, the mention of the Hansard note on the *Witness Anonymity Act* by Madame Justice Cheryl Grant-Thompson at paragraph 31 in *Bruce Colebrooke v The Director of Public Prosecutions [2025] BS 2025 SC 68* is also of assistance. Excerpts from the speech on the floor by then MP Desmond Bannister provides the legislative justification in support of the enactment of the *Witness Anonymity Act*:

> "Government takes the position today, sir, that we have a duty to do our best to protect witnesses who are brave enough to come forward to give evidence against murderers, drug dealers, human traffickers and other despicable criminals who would otherwise get away and return to our communities to do more harm…
>
> However, Mr. Speaker, we must try, and in this respect, I am comforted by the fact that section 13 of the Act outlines rigorous conditions and circumstances that must be complied with before a judge may make an order. So a judge can't just come out and decide to make an order like this. He has to comply with any number of conditions that have to be complied with….

[22.] The following observations of Lord Rodger of Earlsferry in *R v Davis [2008] UKHL 36* are expressed in vivid terms, but they underscore the importance of protecting witnesses. They also illuminate the tension between that objective and an accused person's right to confront those who give evidence against him:

> "(36) The intimidation of witnesses is an age-old and worldwide problem. When Cicero was intent on prosecuting Verres for his reign of terror in Sicily, highly-placed henchmen of Verres threatened "the fearful and oppressed Sicilian witnesses" with dire consequences if they gave evidence against him. Two thousand years later, still in Sicily, prosecutions of Mafia bosses have been bedeviled by the

> prevailing atmosphere of intimidation, with its insidious counterpart, the code of silence, omertà. The same goes for prosecutions of Camorra clan members in Campania and drug traffickers in Colombia. Hollywood has made everyone familiar with the problem of witness intimidation in the United States, whether today or in former times. For many years the wall of silence in London's East End frustrated attempts to prosecute the Kray Twins, until they were taken into custody in 1968 and people felt able to come forward to give evidence. In 1996 worries about the effects of witness intimidation led Strathclyde Police to introduce a Witness Protection Programme."

[23.] Witness tampering, intimidation, threats and actual violence against witnesses are matters of most grave concern. As the authorities cited above make clear, the vulnerability of witnesses is neither a novel nor a geographically isolated phenomenon; it is a longstanding and worldwide concern. The Bahamas is not immune to this reality. The prevalence of retaliatory conduct and gun violence directed at witnesses is a troubling and recurring feature of the criminal court landscape here. Measures that depart from the ordinary manner of giving evidence may be justified in a case where necessary to address this or any other demonstrated risk to witnesses.

[24.] That Respondent's contention that the *Witness Anonymity Act* is unconstitutional is rejected.

[25.] The law is intended to protect vulnerable witnesses and facilitate their participation in the administration of justice, thereby ensuring that criminal allegations are determined on their merits rather than being frustrated by witness interference. More broadly, its serves to protect the public interest in the proper prosecution of criminal allegations.

[26.] The legislation is neither overbroad in its scope nor in the means adopted to achieve its objectives. There is a logical and rational connection between the harm sought to be prevented and the measures provided to address that harm. However, the means adopted cannot be disproportionate to the objective pursued. The Court, therefore, must undertake a balancing exercise weighing any adverse impact on the rights of the accused against the legitimate purpose of the legislation. In doing so, the Court must consider whether the measures adopted impair the rights of the accused no more than reasonably necessary to achieve that purpose.

[27.] The *Act* imposes conditions on the making of an anonymity order requiring the court to assess each application on its particular merits and to balance any demonstrated witness risks against the accused's right to a fair trial. This is a reasonable and measured response to the real risks facing witnesses in The Bahamas requiring a case by case balancing of the harm while balancing the impact on the accused.

[28.] Where the Court grants a witness anonymity order, the procedures currently in place in the Supreme Court for receiving an anonymous witness's testimony serve to minimize the impact on the accused's right to a fair trial. The judge and the jury can see and hear the witness without

alteration or obscuration, including during any cross-examination of the witness by the accused. Although the witness will be obscured to the accused, he will retain the full opportunity to cross-examine the witness.

[29.] It must be recognized that the right to a fair trial is not a consideration confined exclusively to the accused. The fairness of the trial process extends to all participants, including vulnerable witnesses, and must be considered in the broader public interest in the proper administration of justice.

[30.] For the reasons outlined above, the Court is satisfied that the *Act* strikes a constitutionally permissible balance between the protection of vulnerable witnesses, the interests of the accused and the broader public interest in the administration of justice. Accordingly, both the measures provided under the *Act* and the process adopted by the Supreme Court are consistent with the constitutional guarantee of a fair trial.

[31.] The determination of the Application does not require a final assessment of the witnesses' credibility or the strength of their evidence. The *Act* does, however, require the Court to make a preliminary assessment of the significance of their proposed testimony.

[32.] The issue of the identification of the shooter on November 12th, 2022 is central in this case. Witness Alpha's November 14th, 2022 substantive statement and November 20th, 2022 photo line-up identification statement present evidence that is directly relevant to the identification issue. Witness Alpha provides the only identification of the shooter.

[33.] Witness Alpha provided a statement to the police dated 14th November, 2022 saying he/she, on November 12th at around 8:40 p.m., was walking past a bar in the area of Eden Street and Foster Street, Nassau when he/she saw someone he/she knew as Cyril or "CJ" and another male that Alpha knew to be CJ's cousin. Witness Alpha stated that he/she saw a male exit the rear left passenger side of a light coloured jeep holding a handgun in his right hand who fired six to seven shots directly at the person Alpha knew to be CJ's cousin. Witness Alpha described the assailant as tall, slim build, dark skin with bushy hair like dreadlocks wearing all black clothing at the time of the shooting. Witness Alpha stated that he/she had a clear view of the assailant from a distance of twenty feet without any obstructions over a period of five seconds.

[34.] As the above demonstrates, Witness Alpha's statements present badges of reliability. His/her statements record his/her direct observations of the person he/she says was the assailant the evening of November 12th, 2022. He/she noted the conditions and opportunity for his/her observations. Witness Alpha gave a description of the assailant's physical features and noted the clothing he wore. Based on all of these cumulative factors, Witness Alpha identified the Respondent as the assailant after viewing an identification parade eight days after the shooting.

[35.] Witness Alpha presents reliable and probative proposed evidence on the central issue of identification connecting the Respondent to the allegations, if accepted by the jury. This does not complete the analysis. There remain other factors for the Court to consider.

[36.] It is accepted that a prior criminal conviction is relevant to the trustworthiness of a witness. The Applicant has not provided any information respecting the antecedents of Witness Alpha. This information is readily available to the Applicant. The failure to provide this information leaves a material gap in the evidential basis upon which the Court is being asked to exercise its discretion.

[37.] There is no evidence whatsoever on this Application on the issue of motive to fabricate. There is no evidence that Witness Alpha had any relationship with, knowledge of or ever saw the shooter he/she identified as the Respondent prior to the events on November 12th, 2022. Motive to fabricate is, of course, something that can be pursued by the Respondent in cross-examination.

[38.] The Court is directed by Section 13(2) of the *Act* to consider whether the requested anonymous testimony is necessary due to the witness having a "reasonable fear" of injury or death or serious damage to property if he/she were to testify without anonymity.

[39.] The Court has and relies upon the three statements provided by Witness Alpha to the police in determining whether he/she has a reasonable fear to testify without anonymity.

[40.] Witness Alpha provided an anonymous statement to the police dated 14th November, 2022 saying he/she saw a male exit the rear left passenger side of a light coloured jeep holding a handgun in his right hand who fired six to seven shots directly at the person Alpha knew to be CJ's cousin. Witness Alpha gave a description of the assailant's physical features and noted the clothing he wore. Witness Alpha did not state he/she had any relationship with, knowledge of or ever saw the shooter he/she identified as the Respondent prior to the events on November 12th, 2022. Witness Alpha did not specify any fear of injury or death in his/her November 14th statement or in his/her photo line-up identification statement given on November 20th.

[41.] In a more recent statement dated 6th March, 2026, Witness Alpha said he/she would testify at trial only if permitted to do so anonymously owing to "fear that I will be seriously harmed or killed if my identity is revealed".

[42.] The Court is required to assess whether Witness Alpha's fear is one that can reasonably be held having regard to the circumstances of this case.

[43.] The Court accepts and has considered that Witness Alpha in March, 2026 expressed that he/she has "fear that I will be seriously harmed or killed if my identity is revealed". However, that statement does not disclose the basis upon which that apprehension is founded.

[44.] The Court has considered that Witness Alpha purports to have witnessed a violent murder, which the Respondent is charged. Witnessing such an event could well explain Witness Alpha's expressed, subjective apprehension. However, witnessing a violent murder, in the absence of some further evidential basis, is insufficient to establish that Witness Alpha's fear of injury or death without testifying anonymously is objectively reasonable necessitating the measures sought by the Applicant.

[45.] The Court is mindful that a witness does not need to have received an express threat from or have a prior relationship with the accused or a person connected to the accused before a reasonable fear of retaliation can arise. Each case must be assessed on its own facts. Such fear may be established by the surrounding circumstances and, in appropriate cases, inferred from the evidence as a whole.

[46.] The Applicant presents the safety of Witness Alpha as the basis for seeking an anonymity order. Granting that order, clearly, restricts the ordinary right of an accused person to know the identity of a witness and to face his accuser. The Court must, therefore, be satisfied that there is a proper evidential basis for concluding that the requested measures are necessary. It is not sufficient that harm is conceivable or that the witness is apprehensive.

[47.] In the present case, the Applicant has not provided evidence capable of establishing an objective foundation for the fear of injury or death asserted by Witness Alpha if his/her identity is revealed. Having considered the evidence as a whole, the Court is not satisfied that the Applicant has demonstrated that Witness Alpha's expressed fear is objectively reasonable or that withholding his/her identity is necessary for the protection of his/her safety within the meaning of the *Act*.

[48.] The Applicant's alternate submission is that an order permitting Witness Alpha to testify anonymously is in the interests of justice. That said, the Applicant has not meaningfully advanced this argument or presented evidence demonstrating that an anonymity order is otherwise so warranted. The Court readily accepts that the interests of justice favour criminal allegations, especially involving the loss of a human life, being heard and determined on the merits with the participation of all relevant witnesses. However, the fact that a witness' testimony may assist in the prosecution of a serious offence does not, without more, justify withholding the witness' identity in the interests of justice. The Court is not satisfied that withholding Witness Alpha's identity is necessary in the interests of justice in this case within the meaning of the *Act*.

[49.] The Application cannot be granted given the failure of the Applicant to demonstrate the necessity of withholding Witness Alpha's identity within the meaning of the *Act*.

[50.] The Court will briefly address the issue of trial fairness although not necessary to determine the Application given the failure of the Applicant to establish the necessity of anonymity.

[51.] Section 13(1)(b) of the *Act* directs the Court to determine whether the Respondent would receive a fair trial if the proposed anonymity order were made. This question has been largely addressed above when the Court addressed the constitutionality of the *Act*.

[52.] There is no doubt that granting an order for a witness to testify anonymously impacts upon the accused's right to a fair trial. In such case, the accused is denied the opportunity to know the identity of the witness or face his accuser in person in the courtroom, which has long been recognized as an important element of trial fairness and, normally, the preferred way of receiving evidence. However, the question is whether the accused will still have a fair trial where a witness testifies anonymously.

[53.] As noted above, the impact on the accused's right to a fair trial is minimized by the process for receiving the testimony of an anonymous witness now in place for the Supreme Court. The judge and the jury are able to see and hear the witness without alteration or obscuration, including during any cross-examination of the witness by the accused. Although the witness will be obscured to the accused, he will retain the full opportunity to cross-examine the witness. The Court is satisfied that this process strikes an appropriate balance between preserving the anonymity of the witness and safeguarding the Respondent's right to a fair trial.

[54.] Given that the process established in the Supreme Court for anonymous testimony by necessity requires the witness to appear by video, that part of the Application seeking an order for Witness Alpha to have his/her evidence of Witness adduced by television link in accordance with Section 78B(1)(a-c) of the *Evidence Act* is, essentially, redundant where an order is for witness anonymity is granted.

[55.] If the Court had granted that part of the Application seeking to have Witness Alpha provide his/her testimony anonymously then the result would be that he/she will appear by video link. There is no practical difference whether Witness Alpha is physically situated in New Providence or any other location for his/her video testimony, so long as the necessary facilities and resources are available. The Applicant has committed to this Court that facilities for the conducting of the television link within the parameters set forth in the *Evidence Act* would be provided.

[56.] Simply said, an order allowing a witness who has been granted anonymity to provide his/her testimony by television link in accordance with Section 78B(1)(a-c) of the *Evidence Act* would, by necessity and in the interests of justice, be one that should be granted.

[57.] Given that the Court has denied the Applicant's request for ongoing anonymity for Witness Alpha, there is no demonstrated need for this witness to testify by video link. Witness Alpha resides in Nassau and can attend to provide his/her testimony in person in the usual course.

Disposition

[58.] The Application seeking permission for Witnesses Alpha to testify anonymously at trial under the *Witness Anonymity Act* and following the process adopted by the Supreme Court for anonymous testimony outlined in the body of this decision is denied being neither necessary for the protection of Witness Alpha nor in the interests of justice.

[59.] The Application seeking permission for Witnesses Alpha to give evidence by live television link pursuant to section 78B(2) of the *Evidence Act* is denied being neither necessary nor in the interests of justice.

Dated 12th November, 2026

Fitzpatrick J